

Memo

To: BusinessNZ AIG & MCG
From: Paul Mackay
Date: 1 December 2020
Subject: Government Employment Relations Changes

Introduction

1. The Government has committed to making a number of changes to employment laws and policies during its current term. The following is a short analysis of the proposed changes.

Sick Leave

Policy

2. A Bill to increase minimum Sick Leave entitlements from 5 to 10 days a year was introduced to Parliament on 30 November 2020

Comment

3. [Evidence suggests](#) that sick leave usage is commensurate with entitlements. The 2018 national average of sick leave taken sits around 4.7 days, approximately 94% of the statutory 5-day entitlement to sick leave and around 7.1 million person days of lost productivity¹. This suggests that an increase in entitlement will increase absenteeism, affecting productivity. Applying a similar ratio to the proposed entitlement of 10 days per year, gives around 9.4 days, an increase of 3.7 days. The addition of Matariki to the list of public holidays will push this figure to 4.7, that same as for 2018. Given the growth in the workforce since 2018, this will reduce national productivity by an additional factor of significantly more than the 7.1 million person days lost in 2018. This will not assist businesses hard hit Covid-19 recovery and may tip many more over the edge into insolvency. A better option

¹ BusinessNZ and Southern Cross Workplace Wellness Report 2020

would be to attach a sick leave response to the Covid relief package of responses. This would limit the life of an increase, and target those who need to take time off, particularly if they are waiting for the results of a Covid-19 test.

Minimum Wage

Policy

4. Increase the minimum wage, raising it to \$20 an hour in 2021. Beyond 2021, have a balanced approach to minimum wage increases.

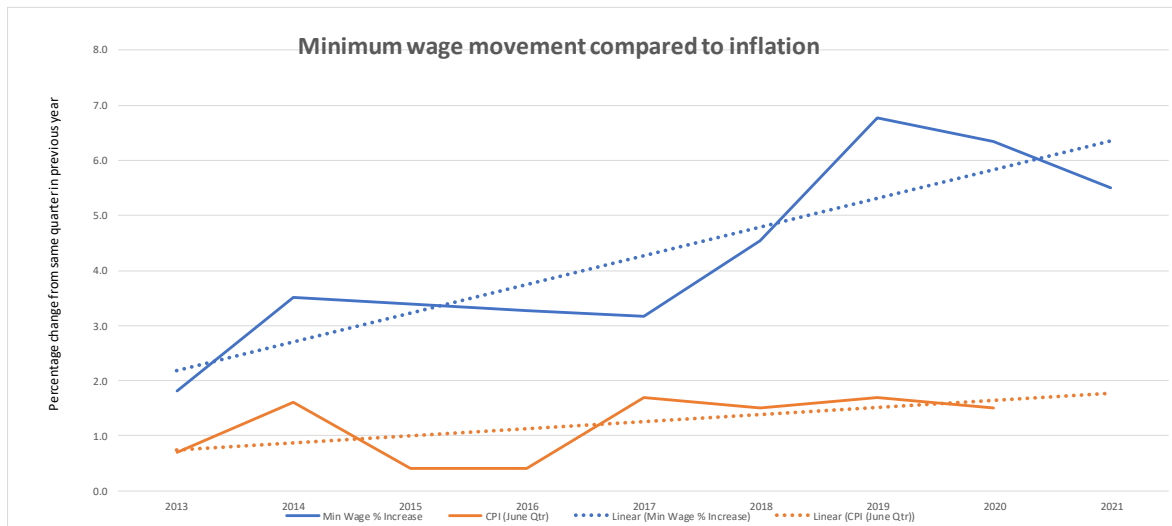
Comment

5. Currently 59% of the average wage, New Zealand's minimum wage is almost the highest in the developed world. Some comparisons:

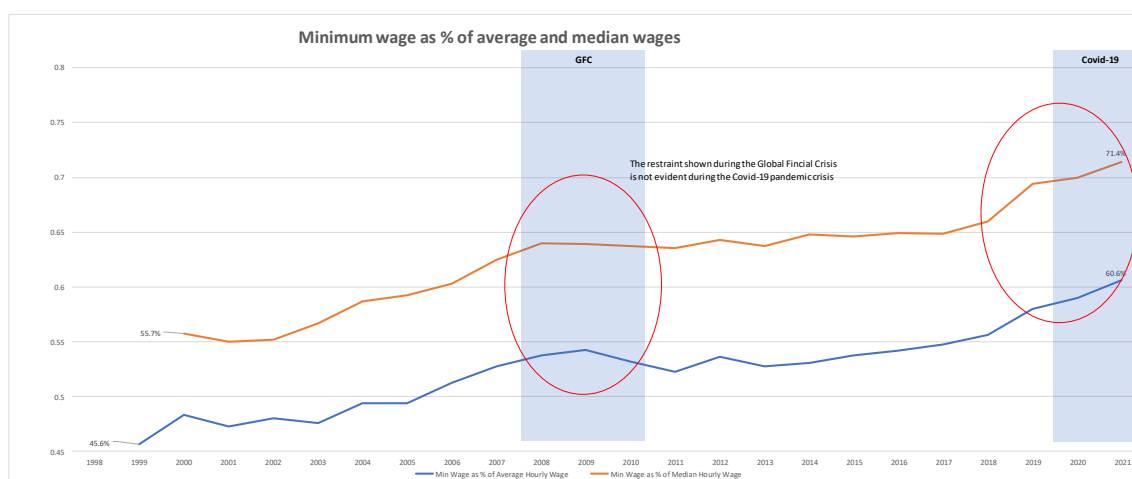
Minimum Wage in	against Average Wage	Against Median Wage
NZ	59%	70%
Australia	54%	54%
UK	46%	55%
Canada	45%	51%
Germany	43%	48%
US	22%	32%

6. The minimum wage, and wages set as a consequence of movements in the minimum wage, are most often associated with hourly paid work. Such jobs also correlate most strongly to the manufacturing, produce, retail, hospitality, services and tourism sectors, the very jobs that will be the backbone of economic recovery from Covid-19.
7. How many jobs get impacted can be assessed by comparing the minimum wage to the median wage. The Government's policy would see the minimum wage at 70% of the median wage.
8. In 2016, the average annual wage was around \$56,600 (\$27.13/hr) and the median wage \$48,180 (\$23.10)². The current minimum wage of \$18.90 is equivalent to an annual wage of \$39,425. Currently the minimum wage is at 70% of the median wage. In setting the minimum wage so close to the median wage the Government is setting the wages of nearly half of all wage and salary earners.

² Source: Statistics NZ. Rounded up figures based on a 40-hour week.



9. This effectively drives costs higher without recognising underlying inflation.



10. Paradoxically, the benefits of a significant increase in lower wages will not be fully realised by employees since many in this earnings bracket also receive Working for Families and other government assistance which abate as wages rise. The Government's policy therefore will not deliver the full value promised increases; instead the major "winner" will be the government and the major "losers" will be employers.
11. Movements in the minimum wage will be exacerbated by increasing pressure to introduce a "living wage." Research by the Treasury has shown this concept to be poorly targeted as it will not only benefit mainly low-paid single people but will also create further unsustainable pressure on wage rates generally. A copy of BusinessNZ's 2020 submission on the minimum wage can be found [here](#).

Living Wage

Policy

12. Require public service contracted security guards, cleaners and caterers to be paid a Living Wage. Progressively expand to also cover contracted workers to the wider state service, including through DHBs, as the COVID recovery allows.

Comment

13. The Living Wage is currently \$22.10. Given the influence of the minimum wage on wage rates generally, further pressure from the Government to adopt the living wage is effectively promoting a rise in the minimum wage to over \$22. Seen in the context of average and median wages, this would place New Zealand in an economically unsustainable position comparative to other developed countries, because our competitive advantage would be eroded significantly by excessively high relative labour costs.

	against Average Wage	Against Median Wage
NZ (incl Living Wage)	69%	82%
Australia	54%	54%
UK	46%	55%
Canada	45%	51%
Germany	43%	48%
US	22%	32%

Pay Equity

Policy

14. Improve transparency for women by ensuring there are better records of pay equity across New Zealand, including by ethnicity and age as well as gender.

Comment

15. No information has been released on how this might be achieved. A likely option is to create mandatory reporting requirements such as are in place in the UK and Australia. These require businesses to report incomes on a gender basis. The UK limits this requirement to businesses over 250 employees, which in New Zealand would be a small portion of the labour market. To achieve comparable coverage New Zealand would need to require reporting from much small firm sizes, making it probable that the majority of businesses would need to report their wage data.

Fair Pay Agreements

Policy

16. Introduce Fair Pay Agreements in line with the recommendations of the Fair Pay Agreement Working Group.
 - a. Agreements would cover both employees and dependent contractors
 - b. Workers would be represented by registered unions during bargaining and only unions would be able to initiate bargaining for the first agreement
 - c. Concluding an agreement would need over 50% support from workers and over 50% support from employers
 - d. Once agreed, Fair Pay Agreements would cover all employers in the sector but there would be able to be negotiated regional variations and exemptions of up to 12 months for employers facing severe financial hardship.

Comment

17. Fair pay agreements are likely to lead to significant increases in the costs of the process and in loss of productivity.
18. The Fair Pay Agreements Working Group acknowledged that productivity was not a foregone conclusion of a national award type system such as this. The government's own advice from Treasury was that there was no case for FPAs.
19. There are also doubts about whether a compulsory system of Fair Pay Agreements is lawful under international law
20. See [here](#) for BusinessNZ's comments on the Fair Pay Agreements Working Group's report.

Holidays Act

Policy

21. Implement the recommendations from the Holidays Act Working Group to reform the Holidays Act, including:
 - a. introducing legislation to simplify employers' leave calculations
 - b. allowing employees to take sick and annual leave when needed with their leave accruing over time instead of becoming available as a block when they reach 6 or 12 months employment
 - c. allowing employees to take bereavement and family violence leave as needed

Comment

22. This is good news. However, introducing a simpler approach going forward does not solve the current issues facing many businesses in relation to calculating and remediating errors on holiday pay calculations over several years. This process has been and is still time consuming and costly. There is a real need to wrap up the existing exercise to permit employers to focus more exclusively on the future

Employment Relations Act

Policy

23. Strengthen section 59b of the Employment Relations Act so unions don't have to establish the "intent" of employers who automatically pass on gains from collective bargaining to non-union workers

Comment

24. This appears to be a reaction to the recent case of [Lamont v Ritchie's Transport Holdings Limited](#) (see Appendix). As such it is an attempt to reduce or eliminate the practice of "free riding" where employers pass the results of collective agreement bargaining to non-union employees (on the basis that they do not wish to pay employees differently simply because they are, or are not, union members. This in turn effectively leads to a situation where unions will seek to "clip the ticket" on non-union employees. If this "clipping" approximates to union fees paid by members, it will be the financial equivalent of compulsory union membership or funding.

Policy

25. Add security guards to Schedule 1A of the Employment Relations Act to provide additional workplace protections for the 5,500 security guards when firms undergo restructuring.

Comment

26. Security guards have long been categorised as an occupation that is frequently contracted out. Part 6A of the Employment Relations Act imposes restrictions on businesses that choose to contract out aspects of their operations. Currently Part 6A covers cleaning, catering and laundry services. Employees of contracting firms whose work is taken over by a different contractor are entitled to transfer to the new contractor (i.e. the employees job follows the contract). This does not assist businesses whose reason for changing contractors is inadequate performance by the workers performing the work under the current contract. Overall, Part 6A has

not attracted much attention in the press or the courts. There therefore is little evidence on which to predict concrete outcomes of this announcement.

Dependent Contractors

Policy

27. Extend collective bargaining and other basic employment rights to dependent contractors including:
 - a. allowing contractors to bargain collectively
 - b. requiring written contracts
 - c. introducing a duty of good faith for dealings between contracting parties.

Comment

28. Dependent contractors are workers who are effectively workers under the control of an employer but who do not receive the legal protections that are currently provided to regular employees under the law. They operate their own businesses and may use their own equipment but depend on one firm for most of their income and have little control over their daily work. The government has identified 11 options for achieving its desire to give more employment protections to dependent contractors. BusinessNZ's submission on the Government's option can be found [here](#). An important consideration will be that giving employment rights to contractors will impose further wage and leave related costs on businesses that engage those contractors. This will simply add to the pressures commented on earlier in relation to increasing the entitlement to sick leave, raising the minimum wage and the further extension of the living wage.

Health and Safety

Policy

29. Raise the age for entry into hazardous work from 15 to 16 to align it with the school leaving age, consistent with International Labour Organisation Recommendation 190 on the Worst Forms of Child Labour.

Comment

30. This will have a material impact on family businesses, particularly primary industry-based ones. There it has been traditional for family members to "help around the farm". This change will limit such activities to older children. However, aligning the age at which hazardous work may be undertaken with the school leaving age does have merit in that it supports New Zealand's long held contention in

international fora that the minimum age for work is set at the age at which compulsory education ceases.

Policy

31. Reinstatement the right for workers in small businesses to elect their own health and safety representatives.

Comment

32. There is nothing to prevent employees in any business from electing employee health and safety representatives. Doing so is not compulsory, however. The proposed change is a move to requiring all businesses to have elected health and safety representatives.

Policy

33. Introduce an industry levy to enable Seafarer Welfare Centres to provide services to the level required by the ILO Maritime Labour Convention 2006.

Comment

34. This is an initiative of the Maritime Union of NZ to have government fund welfare services for seafarers. A report by Human Rights at Sea³ earlier this year found that seafarers' shore-based welfare facilities and services are inadequate. Under the Maritime Labour Convention, New Zealand has an obligation to provide welfare services for crews who come ashore in New Zealand, but this is currently funded largely through charitable sources.

General Comment

35. The Government is justifying its health and safety policies by referencing the need to comply with international labour standards that have been ratified by New Zealand. However the Government may be breaching its obligations under international labour law which require it to operate a system of collective bargaining that is free and voluntary. Its stated intention to make collective bargaining more compulsory via Fair Pay Agreements and placing restrictions on non-union employees receiving union negotiated benefits are examples⁴.

³ <https://www.humanrightsatsea.org/who-are-we/>

⁴ Existing requirements to conclude a collective agreement and permitting the courts to fix wages are also arguably breaches of the Right to Organise and Collective Bargaining Convention 1949 (C98). In July 2019, BusinessNZ laid a complaint with the International Labour Organisation regarding its concerns. The ILO in turn asked for an explanation from the NZ Government which, over a year later, has yet to respond.

Appendix

Lamont v Ritchie's Transport Holdings Limited

This is the first case in which a company has been found guilty of discrimination against union members, simply because they are union members.

Most bus drivers employed by the company belong to one or other of two unions (AWUNZ and FIRST). A few are not members of either union. *Ritchies* concluded a collective agreement with AWUNZ and paid the resulting wage increases to AWUNZ members as well as to the non-union employees.

FIRST demanded that those increases be paid to its members as well. *Ritchies* refused on the grounds that negotiations with the FIRST for a separate collective agreement were continuing, and that any increases for FIRST's members would be settled in negotiations.

FIRST claimed that *Ritchies'* refusal to pay its members the increases negotiated by AWUNZ was discrimination against FIRST members because they were union members.

The ERA agreed, noting among other reasons that several employees who resigned from FIRST were subsequently paid the increases as non-union members. The only employees to not receive increases therefore were FIRST members.

Unusually, claims of discrimination on grounds of union membership are subject to a rebuttable presumption of guilt (the employer is presumed to be guilty of discrimination on this ground unless they can prove otherwise). This "reverse onus of proof" does not apply to claims of discrimination on any of the other prohibited grounds (age, gender, ethnicity, beliefs etc.).

In this instance, the ERA did not accept that *Ritchies'* was able to prove that its reasons for not passing the increases on to FIRST members were not causally related to their union membership.

While the ERA stopped short of awarding the claimed increases to FIRST members (it has required *Ritchies* and the second union to negotiate on this point), it did find discrimination had occurred.

This case has implications for all businesses whose employees are a mix of union and non-union members. Future cases could include penalties and punitive awards for damages.